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In the Supreme Court of the United States

October Term, 1932.

No. 587.

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County,
Respondent.

On Appeal from the Supreme Court of the State of Wisconsin.

PETITION FOR REHEARING.

GOLD AND McCANN,
Attorneys for Respondent.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Of Counsel.

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Now comes the respondent, John J. Gregory, by his counsel, and presents this, his petition for rehearing of the above named cause, and in support thereof respectfully shows:

We are not conscious that our views are colored by the intensity which often attends sustained advocacy of a given cause. For even were respondent to prevail, Katherine Gold, the party in interest, would not necessarily

* Italics ours, unless otherwise stated.

benefit financially by the decision. Though she may obtain judgment in Wisconsin, she would still have to go elsewhere to collect, for the appellant corporation claims it has no property in Wisconsin (R. 5).

The importance of the principle involved in this case to the general public far outweighs its importance to the parties. We believe that the case, by reason of its far-reaching importance, merits further consideration.

This court now, for the first time, lays down the broad rule that the due process clause of the Fourteenth Amendment prohibits a state from enacting legislation authorizing its courts to assert jurisdiction over foreign corporations coming within its borders on a single transaction—even when the subject matter of the suit is that very transaction.

We urge this court to reconsider this question from a more fundamental standpoint, because we believe justice demands it. This nation is going through a period when corporate privileges are being curbed at imperative public demand. The reasons for such demand are too well known to require discussion and no one can deny that the demand is just.

We submit that this decision is a step backward, for it grants foreign corporations a privilege and an immunity which individuals do not enjoy. When an individual person comes into a foreign state, he carries with him all his personal liabilities, and he may be served with process there. There is no reason why a corporation should be entitled to any greater exemption when it comes into a foreign state through one of its chief executive officers to transact some corporate business—even though a single transaction.

Since *Paul vs. Virginia,* 8 Wall. 168, held that a corporation was not a citizen, all kinds of discriminations have been permitted against corporations that would not be allowed against individuals under the equal privileges and immunities clause of Article IV, Section 2, United States Constitution. Hence, it seems paradoxical that a corporation may not be served where an individual may.

We submit that there is no justifiable potency in the due process clause that can logically permit a foreign corporation to come into a State with regard to a transaction and yet insulate itself from the process of the State courts, when the transaction cannot be adjusted, and a citizen of the state attempts to sue the corporation on that transaction. Surely it was never the intention of the framers of the Fourteenth Amendment, nor of the people when they gave their sanction to it, to permit the Fourteenth Amendment to be used as a shield in such cases. In speaking of the due process clause in the Fourteenth Amendment, this court has said:

> "The great purpose of the requirement (of due process) is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." *Dent vs. West Virginia,* 129 U. S. 114, 124.

How can it be said that a statute which attempts to sustain the state's jurisdiction over a foreign corporation when it comes into the state through its chief executive officer to adjust a controversy is a denial of due process of law, when concededly it would be entirely consistent with due process for the state to take jurisdiction in an action against an individual who came into the state to adjust a controversy?

The New York action and the Wisconsin actions arose out of the same subject matter, and Rupprecht, appellant's president, was sent by the corporation into Wisconsin to negotiate with regard to that subject matter—to dissuade the entry of judgment in the New York action and to persuade the Wisconsin bondholders to deposit their bonds. If the corporation had been successful, the result would have been a disposition of the controversy. To say that it is a denial of due process to compel the corporation to litigate in Wisconsin the claim of the Wisconsin bondholders after the corporation has come into the state through its chief executive officer to attempt to dispose of the controversy, and compel those bondholders to go to New York or Delaware to sue the corporation, seems to us to impose a hardship on Wisconsin bondholders which is not justified by the requirements of due process.

The very fact that the validity of service of process on a foreign corporation is to be determined by the particular facts of each case as to the amount of business done, indicates, it seems to us, that it is an unsound rule when applied as a constitutional requirement. The difficulty to apply the rule results in injustice to creditors of foreign corporation. Such a rule makes for uncertainty in the law and enables foreign corporations to take their creditors from one court to another up to the highest court in the land merely to test the question of service. No such indefinite rule should be tolerated unless inevitable, and we submit that there is neither necessity nor justification for such indefiniteness.

We do not ask for an all-inclusive definition of "due process" as applied to service on foreign corporations, but we do say that to determine whether due process is denied a foreign corporation it should be sufficient merely to determine whether or not the officer served was in the state on corporate business, even though on a single transaction.

Such a rule would be logical. The simple test should be: "Is the corporation in the state through an authorized officer to deal with the particular transaction out of which the suit arises?" If it is, due process cannot be said to be violated when that officer is served with process to litigate the subject matter of the transaction concerning which he was sent into the state on behalf of the corporation.

Not a single satisfactory reason has been given in any case to indicate just why service on an officer who comes into the state on a single transaction is a denial of due process of law, but not when there has been a series of transactions. No reason has been given for the distinction between a single transaction and a number of transactions. What constitutional efficacy is there in a number of transactions that one transaction does not possess? A corporation sending its chief executive officer into a state for a single transaction is present in the state so far as that transaction is concerned just as much as if it came into the state a thousand times on other transactions, because as to that transaction *it is present there* and it could not act more fully concerning that transaction than if it were domiciled in the state.

It seems clear to us that a corporation is present in a state insofar as the particular transaction is concerned when the corporation sends an officer into the state's territorial limits on that particular corporate business. This decision fails to recognize what, we submit, is an inescapable fact that if the business done in the state consist of an isolated transaction, the corporation is entirely present in the state for the purpose of that transaction, even though it may not be present outside of that transaction.

This decision is contrary to the general trend of legislative[1] thought on the subject of jurisdiction over foreign corporations. When at least 18 states permit service of process when the officer is in the state on a single transaction, that form of procedure is remarkably wide-spread considering the variety of the process service statutes. Now, it seems to us that a form of procedure so general that it exists in 18 states, can hardly constitute a denial of due process of law.

> "It would be an extraordinary deduction from the 14th Amendment to deny the power of a state to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law." *Wheeler vs. Sohmer,* 233 U. S. 434, 439.

While the universality of a statute affecting substantive rights may not be a ground for conceding it to afford due process, the universality of a procedural statute would

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1. The statutory provisions of the various states for the service of process on foreign as well as domestic corporations differ considerably. But at least the following states, 18 in number, have statutory provisions which are basically similar to that of **Wis. Stats., section 262.09(13)** (official printed edition of the Wisconsin Statutes for the year 1931, pages 1970-1) and seem to permit service of process when the officer comes into the state on a single transaction:

Compiled General Laws of Florida, 1927, Sec. 4251;
Code of Georgia, 1911, Sec. 2258;
Code of Iowa, 1931, Sec. 11072;
Revised Statutes of Kansas, 1923, Chapter 60, Secs. 2522-2524;
Compiled Laws of Michigan, 1929, Chapter 266, Sec. 14094.
Mason's Minnesota Statutes, 1931, Sec. 9231(3);
Mississippi Code, 1930, Sec. 4167;
Revised Statutes, Missouri, 1929, Sec. 728;
Public Laws of New Hampshire, 1926, Chap. 331, Sec. 13;
Compiled Statutes of New Jersey, 1910, p. 1653, Sec. 88;
Compiled Statutes of New Mexico, Chap. 32, Sec. 196;
North Carolina 1931 Code, Sec. 483;
South Carolina Code, 1922, Sec. 390 of Code of Civil Procedure;
Compiled Laws of South Dakota, 1929, Sec. 2336(2);
Complete Texas Statutes, 1928, Sec. 2031;
Compiled Laws of Utah, 1917, Sec. 6548;
Official Code of W. Virginia, 1931, Sec. 14, p. 1361;
Wisconsin Statutes, Sec. 262.09(13).

seem to be very strong evidence that it does afford due process. For what does the due process clause applied to procedural matters insure but to be adjudged according to the laws of the land, fairly applied?

This decision is contrary to the general trend of judicial[2] thought on the subject of jurisdiction over foreign corporations.

A brief reference to the historical background of the subject of jurisdiction over foreign corporations will, we believe, demonstrate a sound cause for reconsideration of the question here involved from a fundamental standpoint.

In order to render a personal judgment a court must get jurisdiction in one of four ways: (1) by presence, (2) by domicile, (3) by allegiance, (4) by consent. A court may obtain jurisdiction of a foreign corporation in only two ways: (1) by its consent, (2) by its presence.

It was thought at common law, until the latter part of the nineteenth century, that service of process on a foreign corporation was impossible because it was said that the corporate officers dropped their official capacity as soon as they left the border of the state of incorporation. *McQueen vs. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5, 7, (1819); *Peckham vs. North Parish*, 16 Pick. (Mass.) 274, 286 (1834); 18 *Fletcher on Corps.*, Sec. 8636 (1931, Ed.).

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2. In **Barrow Steamship Co. vs. Kane**, 170 U. S. 100, 106, it was said:

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

See also **Grant vs. Cananea Copper Co.**, 189 N. Y. 241.

The reasoning of the cases cited on pages 27 and 28 of the Respondent's Brief in this case, which held that a single transaction was sufficient to authorize the state to adjudica e that transaction, seems to us to be in accord with the aim of the **Barrow** case. Those cases place corporations upon the same footing as natural persons. Those cases give satisfactory reasons for their conclusions, whereas the contrary cases do not.

Seemingly the only difficulty felt by the courts was that of service, since none of the cases seemed to doubt that once that difficulty was removed the courts had power to render a personal judgment. *Bushel vs. Insurance Co.*, 15 Serg. R. (Pa.) 173, 176 (1827); *Angell & Ames, Corporations,* Chapter 10, Section 12. That doctrine, however, was breaking down and the weight of authority taking a more liberal and sounder view in favor of jurisdiction (for in *Libbey vs. Hodgdon,* 9 N. H. 394 (1838); *Day vs. Essex County Bank,* 13 Vt. 97 (1841); *Moulin vs. Insurance Co.,* 25 N. J. Law 57 (1855); *March vs. Eastern R. Co.,* 40 N. H. 548, 577 (1860); *North Mo. R. Co. vs. Akers,* 4 Kan. 388 (1868), personal judgments were rendered against foreign corporations doing business within the territory without the consent of the corporation to the jurisdiction of the courts). In the meantime the dictum of Chief Justice Taney appeared in *Bank of Augusta vs. Earle,* 13 Pet. (U. S.) 519, 558 (1839), in which he said:

> "* * * a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Doubtless everyone now concedes that Chief Justice Taney's concept of a corporation was erroneous, but his dictum arrested the development of the sounder doctrine for some time. However, that error, so far as service of process is concerned, was pointed out in the leading case of *St. Clair vs. Cox,* 106 U. S. 350. In that case this court reviewed the history of judicial thought on the subject of service of process on foreign corporations. The court pointed out (106 U. S. 354) that the reason it was at

first conceived impossible that a corporation could be sued upon a personal demand outside the state of its incorporation was based on the doctrine that a corporation had to dwell in the place of its creation and could not migrate to another sovereignty, coupled with the further doctrine that corporate officers did not carry their functions with them when they left the state of incorporation. Actions against foreign corporations were confined to the disposition of such property of the corporation as could be found in the state and even as to such actions enabling legislation was necessary. This obvious injustice, the court said (106 U. S. 355) was finally remedied by legislation. In discussing the validity of service of process on foreign corporations under enabling statutes, the court said (106 U. S. 356) that such legislation satisfied constitutional reqirements so long as it did not encroach upon that principle of natural justice "which forbids condemnation without opportunity for defense"; "which requires notice of a suit to a party before he can be bound by it. It must be reasonable and the service provided for should be only upon such agents as may be properly deemed representative of the foreign corporation."

St. Clair vs. Cox, 106 U. S. 350, did not require that the corporation carry on business within the state to make the service constitutionally valid. That case merely required that service be made on such agent of the corporation as to reasonably assure the corporation of notice of the commencement of suit. Clearly this requirement can be as well met when the corporate officer is in the state on one transaction as on a thousand transactions.

We therefore see that it was by legislation that an injustice was removed and the legislation was declared valid even though before such legislation was enacted this court

considered it impossible for a state to acquire jurisdiction over a foreign corporation. The change in thought was brought about by necessity—changing business conditions. An injustice was remedied by legislation which a generation before would have been considered unconstitutional in absence of economic conditions which demanded the change.

After the reasonableness and necessity of such legislation was accepted, it was held that corporations were suable in foreign states even in absence of enabling legislation. *Barrow Steamship Co. vs. Kane,* 170 U. S. 100. Thus there came about a complete reversal of judicial opinion because the courts came to realize that it was reasonable and just that foreign corporations should be suable wherever service could be obtained upon them.

A much debated and conflicting question then arose: Under what circumstances might service be made on foreign corporations? The first theory was the fictitious "consent" doctrine. 18 *Fletcher Corps.,* p. 112 (1931 Ed.) However, in *Barrow Steamship Co. vs. Kane,* 170 U. S. 100, the contention that the foreign corporation's express or implied consent was necessary to sustain jurisdiction was overruled. And the last blow to the theory of the necessity of consent seems to have been administered by *International Harvester Co. vs. Kentucky,* 234 U. S. 579.

The second and present theory of jurisdiction over foreign corporations is the "presence in the state" doctrine. There is nothing in the due process requirement of the Fourteenth Amendment that can justify a requirement that as a condition of a state asserting jurisdiction over a foreign corporation the corporation's "presence" in the state must be a presence manifested by a continuous course of business in the state, in absence of such definition of

the term in the particular process service statute that may be involved. We do not claim that when a foreign corporation sends its chief executive officer into the state for a single transaction it is generally within the state; but we do claim that *it is present* in the state as to that particular transaction. Otherwise, a corporation could insulate itself as to a part of a transaction and claim that beyond that part the corporation is not in the state. Due process does not require that a foreign corporation have such a privilege. If a corporation may thus insulate itself, it could make the unreasonable claim of freedom from service outside of its regular business hours.

The decision in this case is predicated upon the following cases:

International Harvester Co. vs. Kentucky, 234 U. S. 579;

People's Tobacco Co. vs. American Tobacco Co., 246 U. S. 79;

Philadelphia & Reading Ry. Co. vs. McKibbin, 243 U. S. 265;

Rosenberg Co. vs. Curtis Brown Co., 260 U. S. 516;

Bank of America vs. Whitney Bank, 261 U. S. 171;

James-Dickinson Co. vs. Harry, 273 U. S. 119.

We wish to point out that these cases are based essentially on the construction of various process service statutes and not on the requirements of due process of law.

In the *Harvester* case jurisdiction of the state court was sustained. The case involved review of a judgment of the Court of Appeals of Kentucky and while the service must have been based on a state service statute, the provisions

of that statute do not appear in the opinion. The case cited *Green vs. Chicago B. & Q. R. Co.*, 205 U. S. 530, where the service was set aside. The *Green* case was commenced in the federal court and the validity of the service depended on the federal process service statute. The service was set aside not on the ground of due process, because due process is not mentioned in the opinion, but because there was no compliance with the federal statute which required the defendant to be a resident of the district to be subject to suit there. The *Green* case is apparently the first case where the test of "presence" was used to determine the existence of jurisdiction. But this test was based on the federal service statute not on due process of law as is evident from the language in the opinion (205 U. S. 532):

> "The jurisdiction of the circuit court in this case was founded solely upon the fact that the parties were citizens of different states. In such a case the suit may be brought in the district of the residence of either. Act of March 3, 1875, chap. 137, sec. 1 (18 Stat. at L. 470, chap. 137), as corrected by act of August 13, 1888, chap. 866, sec. 1 (25 Stat. at L. 434, U. S. Comp. Stat. 1901, p. 508). But to obtain jurisdiction there must be service, and the service was upon the corporation in the eastern district of Pennsylvania. Its validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that, through its agents, it was present there."

People's Tobacco Co. vs. American Tobacco Co., 246 U. S. 79, was commenced in federal court and the service was tested by the federal statute—the venue provision under the Sherman Anti-Trust Act. Section 7 of the Sherman Act provided that suits of the character there involved might be brought in the district in which defendant "resides or is found." The decision was based on the requirements of this statute and on the further fact that the per-

son served was not an agent of the defendant at the time of service. That the case was based on construction of a statute and not on due process is apparent from the fact that in *Eastman Kodak Co. vs. Southern P. M. Co.*, 273 U. S. 359, service under similar facts as in the *People's Tobacco* case was sustained, although the amount of business done in the district would not have been sufficient to sustain service under the statute involved in the *People's Tobacco* case. The difference in the result in the *Eastman* case from that in the *People's Tobacco case* was that the process service provision of the statute had in the meantime been amended by the Clayton Amendment to the Sherman Act. As the court said in the *Eastman* case (273 U. S. 372-3) the necessary effect of the Clayton Amendment to the Sherman Anti-Trust Act

> "was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit, not only, as theretofore, in a district in which the corporation resides, or is found, but also in any district in which it 'transacts' business, although neither residing nor found therein."

The *Eastman* case holds that the amount of business necessary to be done so that the corporation may be said to "reside" or to "be found" in the state is much more than the amount required in order to constitute "transacting business" in the state. Here then is a case which holds that it is within the power of the legislative body to change the requirements for valid service on foreign corporations.

In *Philadelphia & Reading Ry. Co. vs. McKibbin*, 243 U. S. 265, the director served was not in the state on corporate business, hence there could be no valid service at all. The case was commenced in federal court and relies on the *Green* case and hence is necessarily based on construction of the federal service statute.

Rosenberg Co. vs. Curtis Brown Co., 260 U. S. 516, was commenced in a New York state court and was removed to the federal court. The service seems to have been tested on a basis of statutory construction and the service statute regarded as being the same as the federal service statute, for the decision was predicated upon the idea that the corporation had to be "present" or "found" in the state (see last paragraph of the opinion). The words "present" or "found" appear to be the requirements of the federal service statute, *Judicial Code*, section 51 (28 U. S. C. A., section 112) or the service provisions under the Sherman Anti-Trust Act. Furthermore, the New York statute required that to be amenable to state process, a foreign corporation had to be "doing business" in New York, *(New York Code of Civil Procedure*, section 1780 (4)) and the *Rosenberg* case, if it considered the state service statute at all (the opinion does not mention the state service statute), construed the requirement of "doing business" to mean more than occasional isolated transactions.

Bank of America vs. Whitney Bank, 201 U. S. 171, was commenced in the federal court and hence the service was tested by the federal statute. The court said (261 U. S. 172):

> "The sole question for decision is whether, at the time of the service of the process, defendant was doing business within the district in such manner as to warrant the inference that it was *present* there."

The case then cites the *McKibbin and Rosenberg* cases. Then again, at 261 U. S. 173, the opinion says:

> "That the defendant was not in New York, and hence was not *found in the district* is clear."

James-Dickinson Co. vs. Harry, 273 U. S. 119, was commenced in an Illinois state court and removed to the

federal court. The Illinois service statute is not mentioned in the opinion but apparently the validity of the service was tested on a basis of statutory construction and the service statute regarded as though it were the same as the federal service statute. For it said in the opinion (273 U. S. 122):

> "Jurisdiction over a corporation of one state cannot be acquired in another state or district in which it has no place of business and *is not found* * * *"

(citing the *McKibbin, Rosenberg* and *Whitney Bank* cases.)

In all the foregoing cases the words used are "present" or "found" in the district or state. Where did these words come from? The words "present there" were first used in *Green vs. Chicago B. & Q. R. Co.*, 205 U. S. 530. That case was speaking of the federal service statute there mentioned which provided that in case of diversity of citizenship "suit may be brought in the district of the residence of either" party. The present federal jurisdiction and venue statute is Judicial Code, section 51 *(28 U. S. C. A., section 112)* which provides:

> "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The earlier statute (R. S., section 739) also contained after the word "inhabitant"— "or in which he shall be found." See *28 U. S. C. A. 112, note 16.*

Some of the cases above cited arose under special statutes such as the Sherman Anti-Trust Law which contains

its own jurisdiction and venue provision. It seems to us, therefore, that the cases upon which this decision is founded clearly show that they are based on statutory service requirements and not on due process of law. The words "present" or "found" in the district are derived from construction of federal service statutes. That this is so was gradually lost sight of in the cases and the phrase "present" or "found" in the district was repeated so often in cases which properly involved only *statutory construction* that the rule seems by imperceptible degrees to have now been changed into a rule of due process.

While, of course, it is not binding upon this court, the reasoning of the court in *Bristol vs. Brent,* 38 Utah 58, seems to us most persuasive. That court said *(38 Utah 64):*

> "Some of the courts have been too much impressed with the rule existing at common law, namely, that a corporation cannot migrate and hence is to be served with legal process only at the place where it was created, and hence these courts have placed a rather strict construction upon statutes (authorizing service). * * * The character of such agents and the manner of making service of legal process upon a foreign corporation must, to a large extent at least, be left to the sound discretion of the legislative power. So long as notice to corporations amounts to due process of law, the mere manner of service or the agent served is not of controlling importance. The only legal question really involved is whether the agent served is one who is directly connected with the corporate affairs, or is conducting some of its corporate business, so that through him the corporation is legally represented. If such be the case, we cannot see that *the nature or the amount* of business that an agent transacts in the foreign state is of great importance." * * *

And again (38 Utah 67):

> "If the person who is designated as agent is in fact the representative of the corporation, we cannot see how it is of controlling importance to *what extent* or *in what particular manner* the agent represents the company, provided the statute authorizes service upon such a person or agent."

The reason corporations ever came to be suable in foreign jurisdictions was that it appeared that it was reasonable and just that they should be subject to suit in places where they voluntarily engaged in business. *In the last analysis the test of jurisdiction is the determination of the reasonableness of its exercise. Farmers' & Merchants' Bank vs. Federal Reserve Bank,* 286 Fed. 566, 577, 588; 18 *Fletcher on Corporations,* p. 115 (1931 Ed.). We submit that it is only reasonable and just that when a corporation sends its chief executive officer into a state for even a single transaction the corporation is present in the state as to that ransaction and should there be amenable to suit as to that transaction by service on such officer. We therefore respectfully request a rehearing in this cause so that further consideration may be given to the far-reaching principle here involved, and the judgment below affirmed.

Respectfully submitted,

GOLD and McCANN,
Attorneys for Respondent.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,

We, Walter L. Gold, Ray T. McCann and Morris Karon, counsel for the above-named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Counsel for Respondent.